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In the Supreme Court of the United States

OCTOBER TERM, 1995

WILLIAM H. DIXON AND ROGER L. NORWOOD,
PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

1. Whether the United States has a right of indemnification against petitioners for amounts paid by the government pursuant to the Department of Veterans Affairs Home Loan Guaranty Program.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-11a) is reported at 68 F.3d 1253. The opinion of the district court (Pet. App. 12a-15a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on October 23, 1995. The petition for a writ of certiorari was filed on January 22, 1996 (a Monday). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. The Department of Veterans Affairs (VA) provides housing assistance to veterans by guaranteeing home loans made by private lenders pursuant to the

Home Loan Guaranty Program (Guaranty Program). Title III of the Serviceman's Readjustment Act of 1944, ch. 268, 58 Stat. 291, 38 U.S.C. 3701-3733.[1] If a veteran defaults on loan payments, the holder of the note may foreclose on the property in accordance with the law of the State in which the property is located. See 38 U.S.C. 3720(a)(6); 38 C.F.R. 36.4319, 36.4320. If the holder forecloses in accordance with the VA's instructions and a deficiency remains after the sale of the property, the VA must reimburse the holder up to the amount of the guaranty. 38 C.F.R. 36.4321.

The VA's regulations provide two alternative courses by which the Department may recover the amount paid on the guaranty. 38 C.F.R. 36.4323(a) and (e). First, the VA becomes subrogated to the rights of the holder and can pursue any causes of action the holder might have had. 38 C.F.R. 36.4323(a). Second, the VA may assert a right of indemnification against the veteran. The regulatory provision governing indemnity states that "[a]ny amounts paid by the Secretary on account of the liabilities of any veteran guaranteed or insured under the provisions of 38 U.S.C. chapter 37 shall constitute a debt owing to the United States by such veteran." 38 C.F.R. 36.4323(e).

2. Petitioners are eligible veterans who purchased homes using mortgage guaranties pursuant to the VA's Guaranty Program. Pet. App. 2a. Both petitioners' mortgages went into default and were foreclosed pursuant to Oklahoma law. *Ibid.* Neither of the lenders involved sought a deficiency judgment

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[1] Those provisions were previously codified at 38 U.S.C. 1801-1833 (1988).

against petitioners. *Ibid.*[2] Pursuant to the guaranty agreements, the VA paid approximately $50,000 to petitioners' lenders, and established administrative debts against both petitioners in the amount of the payments made. *Ibid.*

3. Petitioners filed suit, seeking to enjoin the United States from collecting on their debts to the VA pursuant to the Guaranty Program. They contended that "the VA's right of indemnification was extinguished in each case by the mortgage holder's failure to obtain a deficiency judgment under state law." Pet. App. 14a. The district court granted the United States' motion for summary judgment. Relying on the Ninth Circuit's decision in *Carter* v. *Derwinski*, 987 F.2d 611 (en banc), cert. denied, 114 S. Ct. 78 (1993), the court held that "the VA has the right to both subrogation and indemnification and that '[r]egardless of the method by which a lender proceeds against a defaulting veteran * * * the VA always possesses a right of indemnity against the veteran for the amount of guarantee paid to the lender.'" Pet. App. 14a-15a (quoting *Carter*, 987 F.2d at 616).

4. The court of appeals affirmed. Pet. App. 1a-11a. The court acknowledged that the lenders' failure to obtain deficiency judgments against petitioners precluded the VA from asserting a right of subrogation. *Id.* at 4a.[3] The court held, however, that the VA had

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[2] Under Oklahoma law, a motion for a deficiency judgment must be made within 90 days after a foreclosure sale. Pet. App. 4a n.1.

[3] The court explained that "if the lenders' rights to a deficiency judgment against the veterans fail, the VA's rights through subrogation fail as well. * * * Because foreclosures must be done according to state law, the lenders here needed to

"an independent contractual right of indemnity against the [petitioners]." *Id.* at 4a-5a. Although "adherence to Oklahoma law * * * would have been crucial had the VA attempted to claim subrogation rights," the court explained, "it is irrelevant here because the VA is proceeding under its independent indemnity right, governed entirely by federal law, and unaffected by state deficiency judgment requirements." *Id.* at 5a (citation omitted).

ARGUMENT

1. The regulations governing the Home Loan Guaranty Program provide the VA with two independent avenues for seeking reimbursement for guaranty payments. In exercising its right of subrogation, see 38 C.F.R. 36.4323(a), the VA stands in the shoes of the lender, and its rights are therefore governed by state law. See Pet. App. 4a. In addition, the VA has an independent right of indemnification for "[a]ny amounts paid by the Secretary on account of the liabilities of any veteran guaranteed or insured" under the Guaranty Program. 38 C.F.R. 36.4323(e). The VA's right to indemnity arises under federal law and functions "as part of a nation-wide federal program that should not be affected by state law." *Boley* v. *Brown*, 10 F.3d 218, 222 (4th Cir. 1993). That program "was intended to provide the whole and exclusive source of protection of the interests of the Veterans' Administration as guarantor and was, to this extent, meant to displace inconsistent state law."

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have secured deficiency judgments under Oklahoma law to preserve rights against [petitioners] to which the VA could later be subrogated. Because no deficiency judgments were obtained here, the VA has no subrogation rights against [petitioners]." Pet. App. 4a (citation and footnote omitted).

United States v. *Shimer*, 367 U.S. 374, 381 (1961) (footnote omitted).

In *Shimer*, a veteran incurred a debt to the VA as a result of his default on a mortgage. He argued that the mortgage holder's noncompliance with state law requirements for obtaining a deficiency judgment precluded the VA's claim for indemnification for sums expended pursuant to the guaranty. This Court rejected that contention. Notwithstanding the mortgage holder's failure to follow the procedures set out by state law for obtaining a deficiency judgment, the Court held, the VA remained obligated to serve as guarantor for the loan, and it possessed an independent right of indemnification for payments made as guarantor. 367 U.S. at 386-387.

The veteran in *Shimer* also argued that, since he owed no debt to the mortgagee at the time the VA paid its guaranty, the agency's payment was not made "on account of the liabilities of any veteran" within the meaning of the governing regulation. 367 U.S. at 387 (quoting 38 C.F.R. 36.4323(e)). The Court found that position "untenable" and stated that Section 36.4323(e)

> is merely declaratory of a surety's customary right of indemnity for amounts paid pursuant to an obligation of the guarantor assumed with the consent of the principal. Restatement of the Law of Security, § 104. This right is in general unaffected by defenses of the principal which are not available to the guarantor. The Regulation certainly indicates no purpose to depart from the general rule in the case of guaranties by the Veterans' Administration.

367 U.S. at 387-388 (footnotes and citations omitted).

This Court's decision in *Shimer* makes clear that the VA possesses an independent right of indemnification under the Home Loan Guaranty Program; the agency is not limited to a cause of action based on subrogation, and its right to recover from the veteran is not dependent on the veteran's liability to the mortgagee. *Shimer* also makes clear that any payment properly made pursuant to the VA's legal obligations as guarantor is a payment made "on account of the liabilities of" the veteran within the meaning of 38 C.F.R. 36.4323(e), even if the veteran owes no debt to the mortgagee at the time the payment is made. Finally, the decision establishes that the VA's right to indemnification from the borrower is governed by federal rather than state law.

Applying *Shimer*, four courts of appeals (in addition to the Tenth Circuit in the instant case) have concluded that state law restrictions on deficiency judgments do not limit the VA's right to seek indemnification for payments made in connection with the Guaranty Program. See *United States* v. *Davis*, 961 F.2d 603, 610 (7th Cir. 1992) ("We believe that *Shimer* is directly applicable to this case and therefore choose to follow its lead in sustaining the VA's independent federal indemnity right."); *Vail* v. *Derwinski*, 946 F.2d 589, 592 n.7 (8th Cir. 1991) ("*Shimer* makes clear that indemnity is an independent remedy."); *Carter* v. *Derwinski*, 987 F.2d 611, 615-617 (9th Cir.) (en banc) (VA's indemnification rights stand "on equal footing with the right of subrogation"; state law requirements for obtaining a deficiency judgment "are simply irrelevant" to the VA's rights of indemnification because the "federal indemnity right doesn't depend on state foreclosure or deficiency law"), cert. denied, 114 S. Ct. 78 (1993); *Boley* v. *Brown*, 10 F.3d at

221-222 (VA's failure to satisfy state law requirements for deficiency judgments did not affect its right to indemnification for loan guaranty payments). Although a panel of the Ninth Circuit reached a contrary result in *Whitehead* v. *Derwinski*, 904 F.2d 1362 (1990), its decision was subsequently overruled by the en banc court in *Carter*. See 987 F.2d at 616. In the absence of a circuit conflict, the court of appeals' decision in this case does not warrant further review.

2. The only argument offered in the petition to support review of the court of appeals' decision is the contention that the VA did not protect its rights under Oklahoma law. See Pet. 12-13. As the court of appeals made clear, however, any state law barriers to the VA's subrogation rights were irrelevant to the VA's indemnification rights, the extent of which are defined by federal law. Petitioners' arguments regarding the effect of Oklahoma law are therefore beside the point.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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